



December 5, 2001

Mr. Michael L. Byrd  
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Lubbock, Texas 79464

OR2001-5663

Dear Mr. Byrd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155673.

The Hansford County Hospital District (the "district"), which you represent, received a request for copies of all "written complaints, recorded statements, written statements, bylaws of the hospital district, personnel manuals, employee handbooks, memorandums, agreements, notes, correspondence, and minutes of each of the meetings of the board of directors regarding these issues and the investigation in question." We note that you only submitted copies of three transcripts to us for review. Therefore, we assume that you have provided the requestor with all other responsive information to the extent that it exists. If not, you must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information it must release information as soon as possible under the circumstances to the extent that it exists). You claim that the submitted transcripts are excepted from disclosure pursuant to sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample transcripts.<sup>1</sup>

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<sup>1</sup> We assume that the "representative sample" of transcripts submitted to this office is truly representative of the requested transcripts as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You claim that the submitted transcripts are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). The district maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990); Gov't Code § 552.103(c). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Based on our review of your arguments and the submitted transcripts, we conclude that you have not adequately demonstrated that litigation is reasonably anticipated in this matter for purposes of section 552.103. *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"); *see also* Open Records Decision Nos. 361 at 2 (1983) (finding that fact that individual has hired an attorney or that request for information was made by attorney, does not, without more, demonstrate that litigation is reasonably anticipated), 331 (1982) (find that this office has determined that if individual publicly threatens to bring suit against governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated). Accordingly, the district may not withhold the submitted transcripts from disclosure pursuant to section 552.103 of the Government Code.

You also claim that the submitted transcripts are excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) excepts information encompassed by the attorney-client privilege from disclosure. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. See Open Records Decision No. 574 at 5 (1990). You contend that the submitted transcripts were taken in your capacity as acting General Counsel for the district. However, based on our review of your arguments and the submitted transcripts, we cannot find that the statements in the transcripts reflect communications between an attorney and its client or a representative of the client. Furthermore, we do not find that any of the statements contained within the submitted transcripts constitute an attorney's advice or opinion. Accordingly, we conclude that the district may not withhold the submitted transcripts from disclosure pursuant to section 552.107(1) of the Government Code.

Finally, you claim that the submitted transcripts are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.<sup>2</sup> Information is protected by common law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You state that the statements in the submitted transcripts were given under conditions where the individuals specifically requested and anticipated that the same would be kept private. However, we note that information is not excepted from disclosure merely because it is furnished with the expectation that access to it will be restricted. See Open Records Decision No. 180 (1977). Therefore, the submitted transcripts cannot be withheld from disclosure in their entirety under section 552.101 in conjunction with the common law right to privacy.

However, we also note that the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) addressed the applicability of the common law right to privacy to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. See *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. See *id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common law right to privacy.

The submitted transcripts concern allegations of sexual harassment by the Chief Executive Officer and Administrator of the Hansford County Hospital. Although information relating to investigations of sexual harassment claims involving public employees may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow); *see also Ellen*, 840 S.W.2d at 525. However, the identifying information of victims and witnesses to alleged sexual harassment is protected by the doctrine of common law privacy and must be withheld from disclosure. *See Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied). Accordingly, we conclude that you must withhold from disclosure all identifying information of victims and witnesses to the alleged sexual harassment in the submitted transcripts pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. We have marked a representative sample of the types of information that you must withhold from disclosure. However, you must release the remaining information in the submitted transcripts to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

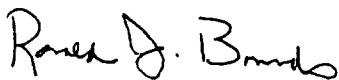
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/sdk

Ref: ID# 155673

Enc: Marked documents

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